

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6138

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

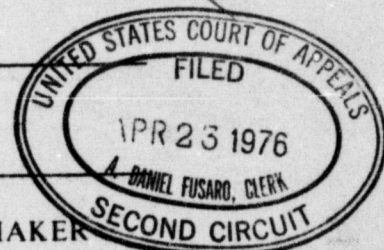
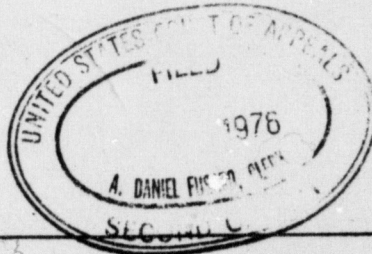
FRIEDA ROSENBERG,

Plaintiff-Appellant,

-against-

ELLIOT RICHARDSON, Secretary of Health, Education and
Welfare,

Defendant-Appellee.



APPELLANT'S BRIEF

DONALD J. FLEISHAKER
Attorney for Plaintiff-Appellant
19 West 44th Street
New York, New York 10036
(212) 697-1234

9503

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(201) 783-7288

TABLE OF CONTENTS

	<u>Page</u>
Introductory	1
Questions Presented	1
Applicable Statutes and Regulations	2
The Facts	4
POINT I	
A Fair and Reasonable Interpretation and Proper Application of the Law Supports Plaintiff's Claim to the Widow's Benefits or at Least in the Alternative, to the Balance of the Widow Benefits Over and Above the Sum of \$1.40 Being Paid Monthly to Celia, in Addition to the Benefits She Had Been Receiving Prior to Wage Earner's Death	6
POINT II	
Social Security Administration Should Not Be Allowed to Retain the Money That Ought to be Paid As Widow Benefits	8
POINT III	
The Secretary's Decision is in Error As a Result of Misapplication of the Law to the Facts	9
Conclusion	14

APPENDIX

Docket Entries	1a
Memorandum of Decision and Order (Filed November 19, 1975).....	3a

UNITED STATES COURT OF APPEALS
For the Second Circuit

----- X

FRIEDA ROSENBERG,

Plaintiff-Appellant,

Docket No. 75 - 6138

-against-

APPELLANT'S BRIEF

ELLIOT RICHARDSON, Secretary of Health,
Education and Welfare

Defendant-Appellee.

----- X

INTRODUCTORY*

Plaintiff appeals from the judgment entered herein in favor of the defendant and against the plaintiff dismissing the complaint pursuant to an order of the Hon. Jacob Mishler (Circuit Court, Eastern District of New York) dated November 18, 1975. The said judgment affirmed the defendant's determination that Frieda Rosenberg, widow of Max Rosenberg deceased and the plaintiff herein be entitled to wife and widow benefits through November, 1971, but not thereafter (TR 137-142) and that Celia Rosenberg, a prior wife of the deceased, be entitled to widow benefits thereafter.

QUESTIONS PRESENTED

1. Did the District Court err in affirming the defendant's final decision by failing to consider the weight of the evidence?

*All numbered parenthetical references are to pages of the Transcript of Administrative Proceedings.

2. Was the Secretary's decision denying the plaintiff widow's insurance benefits after November of 1971 an improper application of the law?

3. Was there sufficient evidence adduced by the defendant to support his findings that (a) the marriage of Max and Celia Rosenberg was not dissolved prior to his death and (b) that the defendant had made an exhaustive search of the records and places where the wage earner was known to have lived with negatived results?

4. Would the granting of widow's insurance benefits to the plaintiff and allowing Celia Rosenberg, a prior wife, to continue to receive the benefits to which she was entitled and had been receiving for $3\frac{1}{2}$ years prior to the death of Max Rosenberg be in conflict with the principles of the defendant not to pay double "widow" insurance benefits?

5. Did the defendant err in not applying equitable principles to the case at bar although no one would be prejudiced thereby?

APPLICABLE STATUTES AND REGULATIONS

Section 216 (h) (1) of the Act, U.S.C. section 416 (h) (1) (B) provides that:

(A) An applicant is the wife, . . . widow, . . . of a fully or currently insured individual for purposes of this title if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, is such insured individual is dead, the courts of the State in which he was domiciled at the time of death . . . would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died. If such courts would not find that such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, . . . widow, . . . of such insured such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of

property as a wife, husband, widow, or widower of such insured individual.

(B) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow . . . of a fully or currently insured individual, or where under subsection (b), . . . or (g) such applicant is not the wife, widow . . . of such individual, but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of the death of such insured individual or (if such insured individual is living) at the time such applicant files the application, then, for purposes of subparagraph (A) and subsection (b), . . . and (g), such purported marriage shall be deemed to be a valid marriage. The provisions of the preceding sentence shall not apply (i) if another person is or has been entitled to a benefit under subsection (b), . . . (e), . . . or (g) of section 202 on the basis of the wages and self-employment income or such insured individual and such other person is (or is deemed to be) a wife, widow, . . . of such insured individual under subparagraph (A) at the time such applicant files the application. . . . The entitlement to a monthly benefit under subsection (b), . . . (e), . . . or (g) of section 202, based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife, widow, . . . of such insured individual but for this subparagraph, shall end with the month before the month (i) in which the Secretary certifies, pursuant to section 205 (i), that another person is entitled to a benefit under subsection (b), . . . (e), . . . or (g) of section 202 on the basis of the wages and self-employment income of such insured individual, if such other person is (or is deemed to be) the wife, widow, For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.

Section 404.329 of the Regulations, 20 C.F.R. section 404.329 provides in relevant part that:

" --A widow or surviving divorced wife is entitled to widow's insurance benefits beginning with the first month in which all the conditions of entitlement described in section 404.328(a) are satisfied and ending with the month before the first month in which any of the following events occurs:

(4) In the case of a woman entitled to widow's insurance benefits based on a purported marriage (see section 404.1101 (c) (2)) to the deceased individual, another woman is certified for entitlement to widow's insurance benefits based on such deceased individual's earnings record and such other woman is the widow (or is deemed to be the widow) of the deceased individual under the provisions of section 216 (h) (1) (A) of the Act . . . "

THE FACTS

Plaintiff, Frieda Rosenberg, was born on April 7, 1907 in New York (TR 69). She and Max Rosenberg, the wage earner, were ceremonially married on October 16, 1935 in Greenwich, Connecticut (TR 68). Both parties had been married previously. Frieda divorced Herbert Ontvile in 1932 in New York (TR 74). The wage earner obtained a Mexican divorce from his first wife, Celia, in 1933. A hearsay statement in the file attributed to the wage earner is that a Mexican divorce had been obtained by "mail order".

The plaintiff, Frieda Rosenberg, applied for wife's social security benefits in 1969 when she reached her 62nd birthday. Subsequently, after the death of Max Rosenberg, the wage earner, on April 14, 1971, she applied for widow's benefits. The amount of the widow's insurance benefits was to be \$165.20 per month.

In the meanwhile, Celia Rosenberg, a prior wife of the decedent, applied and received retirement benefits on her own account commencing in 1967, 3½ years prior to the death of Max Rosenberg. Her independent benefits amounted to \$163.80 per month.

Several months after the death of Max Rosenberg, the said Celia Rosenberg (the

prior wife) suddenly makes application for widow's insurance benefits which would provide her with a mere \$1.40 addition per month; but, would deprive Frieda Rosenberg, the plaintiff herein, of any benefits.

The defendant found in favor of the prior wife.

According to Celia she never consented of a divorce (TR 185), but she knew of the divorce proceedings and never took any steps to disown it or collaterally attack it. The plaintiff, Frieda Rosenberg, entered into her marriage with the wage earner in good faith believing her husband's previous marriage to Celia had been legally terminated by divorce (TR 169). Celia knew of the marriage of the wage earner to Frieda. Celia never objected, opposed or protested the marriage, in fact, she did absolutely nothing about it for 36 years.

On the other hand, Frieda lived with her husband the wage earner as his wife from October 16, 1935 the date of their marriage, until his death on April 14, 1971, a period of 36 years. Out of this marriage were born two children.

Although Frieda was found to be entitled to wife and widow benefits, her benefit payments ceased as of November, 1971 in view of Celia's claim for widow benefits. Celia having been adjudged the lawful wife became entitled to the benefits from December 3, 1971. However, the actual benefits payable to Celia amount to only \$1.40 per month as Celia as a wage earner in her own right was entitled to and was receiving social security benefits of \$163.80 per month since about 1967 as aforesaid. Thus, the widow benefits to which Celia is entitled to is a mere \$1.40 per month greater than her social security benefits of \$163.80.

There, therefore, remains unpaid each month a balance of \$163.80 as benefits which is being retained by the Social Security Administration without justification.

POINT I

A FAIR AND REASONABLE INTERPRETATION AND PROPER APPLICATION OF THE LAW SUPPORTS PLAINTIFF'S CLAIM TO THE WIDOW'S BENEFITS OR AT LEAST IN THE ALTERNATIVE, TO THE BALANCE OF THE WIDOW BENEFITS OVER AND ABOVE THE SUM OF \$1.40 BEING PAID MONTHLY TO CELIA, IN ADDITION TO THE BENEFITS SHE HAD BEEN RECEIVING PRIOR TO WAGE EARNER'S DEATH.

The government's objective is to provide widow benefits for the basic support of the deceased wage earner's widow who is dependent upon him for such support at the time of his death.

Such widow may be either the legal spouse or "deemed marriage" spouse. Both are recognized as eligible persons for widow benefits. However, the "deemed" spouse in this case was the only one who was dependent upon the wage earner herein at the time of his death.

The law provides that a woman who marries a man in good faith, not knowing of any legal impediment, is entitled to benefits; and "potential future entitlement of a legal spouse is not a bar to the 'deemed marriage' spouse's entitlement." (Relationship requirement P-2459).

Although the law recognizes this fact, it is written with the intent to avoid double payment of widow benefits. Therefore, where two spouses exist, payment will be made to the deemed marriage spouse until the legal spouse proves her entitlement to the benefits. This is the method devised to avoid double payment and thus, the birth of the so-called legal spouse theory or policy.

The legal spouse theory is an empiric one. It is not based upon merits nor any scientific method. It is simply a practical means to a solution. In the usual case two persons claim a specific fund. The conflict is resolved by merely determining which person

is entitled to the specific fund. However, in the instant case there is a distinction. Frieda would receive the widow benefits of \$165.20 per month. Whereas, Celia receives only \$1.40 per month more than her entitlement in her own right and not as a widow, and which she had already been receiving.

The Secretary's contention that the recognition of Celia's claim of the additional \$1.40 satisfies the requirement to pay widow benefits since she has been adjudged the legal spouse, is contrary to the government's objective in view of the rights of the deemed spouse to benefits.

The application of equitable principles is always appropriate to accomplish what is intended by the law so long as no one is prejudiced. Thus, the Secretary's strict technical application of the law, which would cause serious irreparable harm to the deemed spouse without benefit to the legal spouse nor prejudice to the government is an anomaly. It not only does not serve the government's objective but it creates an injustice.

Moreover, in her application for social security benefits in 1967, Celia Rosenberg expressly waived in writing her right to widow benefits. Further, she impliedly waived her right to widow benefits when for over 36 years she was separated from her husband, and remained silent. She did not appear in the Mexican divorce proceeding, yet she admittedly (a) had knowledge of the proceeding, that it resulted in a divorce in April of 1935 and that subsequent thereto, (b) her husband had entered into matrimony with Frieda, the deemed spouse. As stated above, Celia did not file any objection to such proceedings or to the divorce nor protest or oppose the marriage to Frieda nor did she see fit to notify Frieda of the existent impediment.

Under these circumstances, Celia should be held to her waiver and estopped from claiming the benefits of the insignificant additional sum of \$1.40 per month, and Frieda should be granted the widow benefits.

To allow this pyrric victory for Celia to go uncorrected would be a travesty of justice and opposed to the very intent and purpose for which the Social Security Act was created.

POINT II

SOCIAL SECURITY ADMINISTRATION SHOULD NOT BE ALLOWED TO RETAIN THE MONEY THAT OUGHT TO BE PAID AS WIDOW BENEFITS.

To allow the Social Security Administration in this case to keep the payment of widow benefits above the \$1.40 would be unjust enrichment and an injustice to the deemed marriage spouse.

Unless we are ready to place the Social Security Administration in the same category with the few private insurance companies which are always too ready to avoid the payment of benefits on any flimsy technical interpretation of its provisions, we cannot accept the determination that the payment of the additional \$1.40 per month to the legal spouse should fully serve the requirements of social security to pay widow benefits which calls for the payment of \$165.20. Such determination is not only unfair and unjust but legally inequitable and should not be tolerated.

The court must direct the Social Security Administration to pay the full widow's benefits of \$165.20 if there are persons entitled to receive it. In this case, it is the plaintiff's contention that she is entitled to the full payment but in any event she should at least receive the balance of \$163.80 per month remaining unpaid. A fair and just solution would be for Celia to receive the \$1.40 in addition to her own benefits and Frieda the balance of \$163.80.

A narrow restrictive view of the regulations will not serve the intent and purpose of the Social Security Act.

The Administration should make every effort to interpret the laws liberally in order to come to an equitable and just result so that the benefits provided for by the Social Security Act will be appropriately paid.

POINT III

THE SECRETARY'S DECISION IS IN ERROR AS A RESULT OF MISAPPLICATION OF THE LAW TO THE FACTS.

Plaintiff's eligibility has been established prima facie by undisputed evidence of the official marriage of Frieda to Max Rosenberg, the wage earner, in Connecticut on October 16, 1935.

Although the Appeals Council correctly stated the New York law as it relates to second marriages, it failed to apply it correctly. It said: "Under New York law, a presumption exists in favor of the validity of the last marriage and is referred to as one of the strongest known to the law." (TR 129) (Ours).

There can be no dispute but that the marriage of the plaintiff, Frieda, to Max Rosenberg on October 16, 1935 in Connecticut was his second and last marriage. Under the law, "The presumption of validity of the second marriage can be negated only by disproving every possibility of its legality" (DiMilio v. New York State Thruway Authority, 235 N.Y.S. 2d 642, affirmed 19 A D 2d 945, 245 N.Y.S. 2d 1005.) In that case the court sustained the right of inheritance of a second marriage, a common-law marriage, in Ohio, despite testimony by the prior legal wife that she had never been divorced.

In Case v. Case, 281 N.Y.S. 2d 241, 54 Misc 2d 20, the court held, "The presumption of validity of the second marriage places on the person who seeks to rebut it, the burden of proving that the prior marriage was not terminated prior to the marriage in

question." Reference was made by the court to Foster and Freed, "Law and the Family", Vol. 1, p. 85: "A person having entered into two successive marriages, a presumption arises which has been said to be one of the strongest presumptions of law in favor of the validity of a second marriage."

In Apelbaum v. Apelbaum, 183 N.Y.S. 2d 51, 7 A D 2d 911, cited by the United States Attorney in his original brief to the lower court (p. 6), actually sustains the plaintiff's position. The court there said, "The presumption favoring the validity of marriages and legitimacy of children are so strong as to eclipse the presumption that might otherwise protect the validity and subsistence of a prior marriage of one or another of the parties and to place upon the party who seeks to rebut these presumptions the burden of proving that the prior marriage or marriages were valid and not terminated prior to the marriage in question even though this might require the proof of negative."

In a leading case on this point in the matter of Dugro's Will, 261 A D 236, 25 N.Y.S. 2d 88, 93, affirmed 287 N.Y. 595, the court said, "We think that, where the fact of a marriage, especially of a ceremonial marriage, followed by the long cohabitation of the parties and the birth of children, it is incumbent upon whoever assails the validity of the marriage and the legitimacy of the children to prove his case, even if that involved proof of a negative ***." It was further said in Dugro's Will, supra, that "The presumption of the validity of the second marriage can be negated only by disproving every reasonable possibility of its legality."

The decision of the Appeals Council clearly indicates that in spite of its correct presumption, it parted company with the law and made findings of fact, as though the burden of proof, rested upon the person of the second marriage to invalidate the first marriage.

Although the courts are generally loathe to disturb a decision of an agency,

nevertheless where the question is one of law, the courts will not hesitate to intercede. to set aside legally erroneous findings of fact. Payne v. Weinberger, 480 F. 2d 1006 (5th Cir. 1973) Leagram v. Richardson, 471 F. 2d 1268 (6th Cir. 1972).

After reviewing the credible evidence and taking into consideration the totality of all the evidence of this case and applying the strongest presumption in favor of the validity of a second marriage which exists under the New York law the court must find that the marriage of Frieda to Max Rosenberg was not negated by disproving every possibility of its legality.

The Appeals Council had made two findings of fact which are unsupported by evidence -- certainly not by the strongest evidence nor evidence of substance in view of the applicable law.

The Appeals Council's two findings (130), (a) "The record contains convincing evidence that the marriage between Max and Celia Rosenberg was not dissolved prior to his death." and (b) "The Social Security Administration made an exhaustive search of the records and places where the wage earner was known to have lived with negative results." This last statement is absolutely without foundation or support. No exhaustive search was ever made. Only five requests for information regarding any divorce between Max Rosenberg and Celia were made and these were confined to the period between 1969 to the date of his death on April 14, 1971 even though the marriage to the plaintiff, Frieda, was performed on October 16, 1935, 36 years prior to the death of Max Rosenberg. One of the inquiries was made of a sister of Max who knew of his Mexican divorce and a nephew and three county clerks. That was the sum and substance of this so-called "exhaustive search". Obviously, this was not only not exhaustive but was grossly inadequate to rebut the strong presumption to the contrary.

There only exists two items, a statement by Celia that she did not divorce Max

and an unverified statement which appears to have been attributed to Max that he had obtained a Mexican divorce which he termed as "mail order". However, he stated in substance that notification of the Mexican divorce proceedings had been given to Celia. Is this kind of evidence sufficient to set aside this strong presumption of the validity of the second marriage of 36 years duration, out of which there were two children born and four grandchildren?

Looking at the proof in the record it not only fails to establish the burden placed on Celia, but it raises great doubt as to anything Celia might have said at the hearing. On September 15, 1967, about 3½ years before Max died, Celia filed an application for retirement benefits based on her own earnings. In this application, Celia said that she was a widow, that her husband died in 1954, she gave her husband's name as "Louis" Rosenberg, not "Max" --she stated that she was not filing as a widow but was electing to take her own social security benefits which were higher (186).

However, in 1971 after Max's death, Celia filed an application for widow's insurance benefits. This application, in response to question 14, she said the date her husband was last home was in 1933 (183). She responded to question 15, which reads as follows:

"Answer question 15 only if you were divorced from the deceased."

(a) Was deceased under a court order to contribute to your support? ☒ (yes) ☐ (no)

(b) Was deceased contributing to your support? ☒ (yes) ☐ (no)

(183).

In the section calling for "remarks" (185), Celia admitted that deceased allegedly obtained a Mexican divorce, denying that she consented to it or appeared in the proceeding.

In the above form, she also acknowledged a divorce status and in addition knowledge of the marriage of Max to Frieda. This is the entire case of Celia against the validity of the marriage of Frieda and Max. Can this be held to have rebutted one of the strongest presumptions of law in favor of the validity of the second marriage by disproving every possibility of its liability? The answer is obviously, "no".

Now, let us proceed to the supportive evidence in favor of the second marriage.

(a) A marriage license was issued by officials in the State of Connecticut. As a condition precedent to the issuance of the license and in accordance with its law, an official divorce certificate had to be and was presented to the authorities. A ceremonial marriage was thereafter performed by a justice of the peace. The presumption from the issuance of a marriage license under these circumstances is that the divorce certificate was reviewed and found legally satisfactory to the Connecticut authorities.

(b) The marriage was consummated and Frieda and Max thereafter lived together as man and wife for 36 years until his death, having had two children and four grandchildren.

(c) In addition, the marriage between Max and Frieda continued undisturbed for 36 years. Admittedly, no attack, directly or collaterally, was ever made by Celia in her 38 years of her separation from Max.

(d) Another important factor which cannot be overlooked is the fact that Celia made an application for widow benefits, even though it only would give her an additional \$1.40 per month, when she knowingly was depriving plaintiff, Frieda, of \$165.20 per month. Celia, as a wage earner, was entitled and received in her own right social

security benefits of \$163.80 monthly. Can it be said that this application by Celia was made in good faith and without ulterior motive? Obviously, the intent was to harm Frieda without benefit to herself. A decision under these circumstances based on anything Celia said would be unfair, inequitable, an injustice and in reality an aborting of the law.

Equitable factors must be considered in this determination involving invalidating a second marriage (Dugre's Will, supra; DiMilio v. New York State Thruway Authority, supra, and Apelbaum v. Apelbaum, supra).

It is respectfully submitted that Celia has not sustained the burden of proof required under the law to upset the strong presumption in favor of the validity of a second marriage nor was a second marriage negated by disproving every possibility of its legality. There was a failure of substantive evidence to support the findings of invalidity of the second marriage.

As was in the case of Payne v. Weinberger, 480 F. 2d 1006 (5th Cir. 1973) "Our review of the record of this case, the whole record, leaves us unable to conclude here that the Secretary's decision was supported by substantial evidence."

CONCLUSION

The judgment appealed from should be modified with the direction that the Secretary should find the plaintiff, Frieda Rosenberg, entitled to the insurance benefits as the lawful widow of the wage earner, Max Rosenberg, and direct that as such widow she be paid all the benefits to which she would be entitled under the Social Security laws from the date of death of Max Rosenberg, deceased.

Respectfully submitted,

DONALD J. FLEISHAKER
Attorney for Plaintiff-Appellant

DOCKET ENTRIES

1a

MISHLER, J.

71C 482

DOCKET

TITLE OF CASE

ATTORNEYS

FRIEDA ROSENBERG

-against-

ELLIOTT L. RICHARDSON, Secretary of
HEALTH, EDUCATION and WELFARE of the
UNITED STATES OF AMERICA

For Plaintiff: ~~Lawrence Henry~~

~~Park, Esq. 101 Park Ave~~
~~NYC 10017 682-1700~~
Donald J. Fleishaker
19 West 44th Street
N.Y., N.Y. 10036 697-123

For Defendant:

U. S. ATTORNEY

BASIS OF ACTION: TO REVIEW EXAMINER'S DECISION/SSA

JURY TRIAL CLAIMED

ON

[illegible]

ABSTRACT OF COSTS

RECEIPTS, REMARKS, ETC.

[illegible]

2a

DATE	FILINGS PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURN	
4-28-71	Complaint Filed. Summons Issued.	1	JS5
5-7-71	Summons Returned and Filed-executed	2	
5/23/71	By Mishler, Ch.J.-Order extending time for deft to answer to complaint to 8/31/71 filed.	3	
8-31-71	ANSWER of deft filed.	4	
8-31-71	Certified copy of transcript of the entire record of proceeding relating to the claim of Frieda Rosenberg filed.	5	
1-30-73	By MISHLER, CH.J. - Order dtd 1-29-73 remanding case to H.E.W. for further action filed. (P/C mailed to attys). <i>JS5</i>	6	JS5
4-2-75	Notice of motion with annexed supplemental record of proceedings at H.E.W. and memorandum of law for a judgment on the pleadings, ret 5-2-75 at 10 A.M. filed.	7/8	
4-29-75	Memorandum of law in opposition to deft's motion for judgment on the pleadings filed.	9	
4-30-75	By MISHLER, CH. J. - Order dtd 4-29-75 substituting attys for plttf filed.	10	
5-2-75	Before MISHLER, CH. J.-Deft's motion for judgment on the pleadings submitted.		
7-7-75	Case reopened pursuant to outstanding motion.	JS5	
11-19-75	By MISHER, CH. J. - Memorandum of Decision and Order dtd 11-18-75 granting deft summary judgment dismissing the complaint filed.	11	
1-19-75	JUDGMENT dtd 11-19-75 dismissing complaint filed. (p/c mailed to parties).	12	<i>JS5</i>
7/75	NOTICE OF APPEAL FILED. Duplicate of Notice of Appeal and docket entries mailed to the C. of A.	13	
		14	

MEMORANDUM OF DECISION AND ORDER
(Filed November 19, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

71 C 482

FRIEDA ROSENBERG,

Plaintiff,

-against-

ELLIOT RICHARDSON, Secretary
of Health, Education and
Welfare,

Defendant.

Memorandum of Decision
and Order

November 18, 1975

MISHLER, CH. J.

Plaintiff commenced this action under 42 U.S.C. §405(g) to obtain review of defendant's final decision denying plaintiff's application for widow's insurance benefits, 42 U.S.C. §402(e). Incorporating the entire administrative record into his answer, defendant moves for judgment on the pleadings. Rule 12(c) (F.R.Civ.P.).

Defendant's final decision is subject to only limited review by the District Court. Such decisions if supported by substantial evidence must be affirmed. Payne v. Weinberger, 480 F.2d 1006 (5th Cir. 1973); Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972).

Two hearings were held to determine plaintiff's right to Social Security benefits because of her alleged marriage to the deceased wage earner, Max Rosenberg. It was finally determined that plaintiff was entitled to wife's and widow's benefits through November,

Memorandum of Decision and Order

1971. At that time Celia Rosenberg who also applied for widow's benefits based on Max Rosenberg's record became entitled to them. It was found that Celia Rosenberg was the true wife and widow of Max Rosenberg, and that the termination provisions of 42 U.S.C. §416(h) (1) (B) operated to cut off plaintiff's benefits.

The record indicates that there was substantial evidence to support defendant's determination.^{/1} Defendant's motion for judgment on the pleadings is granted, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the defendant and against plaintiff dismissing the complaint.


U. S. D. J.

^{/1}

The record of the hearings shows that on March 27, 1969, Max Rosenberg stated that the only divorce he had obtained from Celia Rosenberg was a Mexican "mail order" divorce in 1933. Such a divorce is invalid in both New York and Connecticut. Caldwell v. Caldwell, 298 N.Y. 146 (1948); Scala v. Folsom, Unempl. Ins. Rep., 12,359 (1956), aff'd., 243 F.2d 893 (1957). The Social Security Administration then inquired of all the jurisdictions in which Max Rosenberg resided subsequent to 1969 as to divorce proceedings involving him. All responses were negative. Plaintiff suggests that this is not sufficient evidence to overcome the presumption of the validity of the last marriage.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRIEDA ROSENBERG,
Plaintiff- Appellant,

- against -

ELLIOT RICHARDSON,
Defendant- Appellee,

Index No.

Affidavit of Personal Service


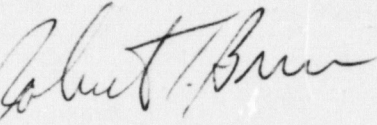
STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Reuben A. Shearer *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
211 West 144th Street, New York, New York 10030
That on the 23rd day of April 19 76 at 225 Cadman Plaza, Brooklyn, New York

deponent served the annexed Appellant Brief & Appendix upon
David Trager

the Attorney in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 23 19 76
day of April


Reuben Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977